YONG TIM

v.

HOO KOK CHONG & ANOR

FEDERAL COURT, PUTRAJAYA
ABDUL MALEK AHMAD PCA
STEVE SHIM CJ (SABAH & SARAWAK)
SITI NORMA YAAKOB FCJ
[CIVIL APPEAL NO: 02-9-2004 (A)]
3 FEBRUARY 2005

CIVIL PROCEDURE: *Fraud - Standard of proof in civil action - Whether proof beyond reasonable doubt or on balance of probabilities - General rule (in civil proceedings) on proof of facts amounting to commission of crime, balance of probabilities - Exception to general rule - Whether 'fraud' an established exception requiring proof beyond reasonable doubt - Distinction between 'fraud' and 'forgery'*

EVIDENCE: *Standard of proof - Fraud alleged in civil case - Whether requiring proof beyond reasonable doubt or on balance of probabilities - General rule (in civil proceedings) on proof of facts amounting to commission of crime, balance of probabilities - Exception to general rule - Whether 'fraud' an established exception requiring proof beyond reasonable doubt - Distinction between 'fraud' and 'forgery'*

This was a land dispute on appeal to the Federal Court from the decision of the Court of Appeal overturning the decision of the High Court. The learned judge had earlier found in favour of the defendant/purchaser, holding that the plaintiffs/beneficiaries had failed to prove beyond a reasonable doubt that the transfer of the trust land in question by the plaintiffs' grandfather/trustee to the defendant was obtained through fraud.

Before the Federal Court, the principal question of law for which leave to appeal was granted was: (i) whether the civil standard of proof as applied in 'forgery' cases – which is proof on a balance of probabilities as enunciated by the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* – should also be applied in 'fraud' cases.

Held (answering the question in the negative)
Per Steve Shim CJ (Sabah & Sarawak) delivering the judgment of the court:

[1] In finding that the plaintiffs had failed to establish fraud on the part of the defendant, the learned judge had applied the 'beyond reasonable doubt' standard of proof, following the decision of the Privy Council in *Saminathan v. Pappa* [1980] 1 LNS 174 (PC). Indeed, this was the correct test and standard of proof to use. The Court of Appeal was wrong to have reversed the learned judge on this point. The standard of proof for fraud in civil proceedings is proof beyond a reasonable doubt. The question of law postulated above must, therefore, be answered in the negative. (pp 233 a-g, 234 a-h & 235 a-d)

[2] With regard to the standard of proof to be applied in civil proceedings, a clear distinction must be drawn as between 'forgery' and 'fraud'. The general rule is that proof in civil proceedings of facts amounting to the commission of a crime (including forgery) need only be on a balance of probabilities. However, the common law of Malaysia has developed an exception to this general rule; hence, where fraud (as opposed to forgery) is alleged in civil proceedings, it (the alleged fraud) has to be proved beyond a reasonable doubt. (pp 233 a-g, 234 a-h & 235 a-d)

[3] Although the Court of Appeal had misdirected itself in applying the 'balance of probabilities' standard of proof, nevertheless, it would have come to the same conclusion (that there was fraud) had it applied the correct standard of proof, ie, proof beyond a reasonable doubt. For this reason, the defendant's appeal ought to be and was dismissed. (pp 235 e-h, 236 a-h & 237 a-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Rayuan semasa ini merupakan satu kes pertikaian tanah yang telah dibawa kepada Mahkamah Persekutuan selepas Mahkamah Rayuan mengakaskan keputusan Mahkamah Tinggi. Hakim Mahkamah Tinggi, terdahulunya, telah membuat keputusan yang berpihak kepada defendan/pembeli setelah beliau mendapati bahawa plaintif/benefisiari telah gagal membuktikan tanpa keraguan munasabah bahawa pindahmilik tanah amanah yang berkenaan daripada datuk plaintif/pemegang amanah kepada defendan adalah diperolehi menerusi fraud.

Di hadapan Mahkamah Persekutuan, persoalan undang undang yang utama di atas mana kebenaran untuk merayu telah diberikan adalah: (i) sama ada tahap kebuktian kes sivil yang dipakai untuk kes pemalsuan (forgery) – iaitu bukti atas imbangan kebarangkalian sepertimana yang telah di syorkan oleh Mahkamah Persekutuan di dalam kes *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* – patut juga digunapakai untuk kes fraud.

Diputuskan (menjawab persoalan dalam negatif)
Oleh Steve Shim HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

[1] Dalam mendapati bahawa plaintif telah gagal membuktikan yang defendan telah melakukan fraud, Hakim Mahkamah Tinggi telah memakai tahap bukti tanpa keraguan munasabah mengikut kes Privy Council *Saminathan v. Pappa* [1980] 1 LNS 174 (PC). Ini memanglah tahap bukti yang betul untuk digunakan. Sebaliknya, Mahkamah Rayuan telah tersilap apabila ianya mengakas keputusan Hakim Mahkamah Tinggi di sini. Tahap bukti untuk kes fraud di dalam prosiding sivil adalah bukti tanpa keraguan munasabah. Oleh yang demikian, persoalan undang-undang yang di hadapkan kepada Mahkamah Persekutuan di atas mestilah dijawap dengan negatif.

[2] Untuk tujuan tahap bukti yang diperlukan di dalam prosiding sivil, perbezaan yang jelas mesti dibuat di antara 'pemalsuan' (forgery) dan 'fraud'. Untuk membuktikan sesuatu perlakuan jenayah (termasuk pemalsuan) di dalam prosiding sivil, rukun am hanya memerlukan tahap bukti atas imbangan kebarangkalian. Walaubagaimanapun, kini sudah terdapat satu kekecualian di dalam common law Malaysia berkenaan rukun am tersebut; yakni, apabila terdapat dakwaan fraud (dan bukannya pemalsuan) di dalam prosiding sivil, ianya mestilah dibuktikan tanpa keraguan munasabah.

[3] Walaupun Mahkamah Rayuan tersalah arah kerana memakai tahap bukti atas imbangan kebarangkalian, namun begitu ia memang akan mencapai keputusan yang sama (iaitu terdapatnya fraud) jika ia telah memakai tahap bukti yang betul, iaitu bukti tanpa keraguan munasabah. Oleh kerana itu, rayuan semasa defendan terpaksa ditolak.]

Case(s) referred to:
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 1 MLJ 241 FC ***(foll)***
Rejfek v. McElroy [1965] 112 CLR 517 ***(refd)***
Saminathan v. Pappa [1981] 1 MLJ 121 ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 7(3A)
Rules of the High Court 1980, O. 18 r. 12

For the appellant/defendant - Tan Lip Gay (Ng Poh Tat with him); M/s Ng Poh Tat & Co
For the respondents/plaintiffs - A Silvanathan (M Mathialagan with him); M/s Madhi Param & Co

Reported by Gan Peng Chiang

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

On 21 June 2004, the Federal Court granted the appellant leave to appeal on the following questions:

1. Should the standard of proof in civil cases for "forgery" as expressed to be on a balance of probabilities in the decision of the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 be applied also to the case of "fraud"?

2. Whether the inclusion of further evidence under r. 7(3A) of the Rules of the Court of Appeal 1994 precludes the plaintiffs/respondents from particularizing the incidents of fraud in the statement of claim as prescribed by O. 18 r. 12 of the Rules of the High Court 1980?

In the memorandum of appeal, the appellant has advanced 13 grounds but they appear to relate only to the first question. This is hardly surprising since the second question is quite inconsequential to the issues in dispute between the parties. It is in that context that our consideration must fall.

Now, this case involved a dispute over 2 pieces of land known as EMR 1265 Lot 1346 and EMR 1266 Lot 1347 Mukim of Selama, Perak (the said lands). They belonged to one Hor Choy, the grandfather of the respondents. On 30 December 1966, Hor Choy executed a deed of trust over the said lands. He was to hold them on trust for the respondents, who were then minors, until they reached the age of majority. In the meanwhile, Hor Choy was conferred the power of sale of the said lands. However, Hor Choy died on 26 November 1969. As the respondents were still minors, the administration of the said lands was entrusted to their father Ho Too Onn. In 1974, Ho Too Onn allowed the appellant to use the said lands for 10 years after which they were to be handed back to the respondents. In 1984, upon attaining the age of majority, the respondents asked the appellant for the return of the said lands. The appellant refused claiming that he had actually purchased the said lands from the late Hor Choy in June 1969 for RM10,400. He also claimed to be the legal owner since 1969 and had applied for and obtained titles in continuation in respect of the said lands in 1976. The respondents thereafter took out an action seeking inter alia a declaration that the transfer of the said lands from Hor Choy to the appellant was null and void; that the appellant was to execute a proper transfer of the said lands to the respondents or alternatively, that the land office be required to execute the said transfer. The basis of the respondents' action was that the appellant obtained the said lands by fraud and falsification of documents. After a full hearing, the High Court found against the respondents. However, on appeal by the respondents, the Court of Appeal reversed the decision of the High Court.

In connection with the first question, the following passage in the judgment of the Court of Appeal is relevant. It states:

> The learned Judge held that the Plaintiffs failed to prove fraud beyond reasonable doubt against the Defendant. He relied on the authority of *Saminathan v. Pappa* [1981] 1 MLJ 121, a Privy Council case. With due respect, the learned judge applied the wrong standard of proof on fraud. The proper test is that on a balance of probabilities (see *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133) FC.

Given the position taken by the Court of Appeal, it is, we think, appropriate to examine in some detail the two cases cited above. In *Adorna Properties Sdn Bhd*, the Federal Court said *inter alia*:

> For proof of forgery, such as the one under appeal, whether the standard of proof is on a balance of probabilities or beyond reasonable doubt?
>
> The same arguments which the parties had put before both the High Court and the Court of Appeal were again argued before us. The High Court held that forgery must be proved beyond reasonable doubt, while the Court of Appeal held that it should be on a balance of probabilities. For the reasons given by the Court of Appeal we entirely agree that the standard of proof required to prove 'forgery' in civil cases is one on a balance of probabilities.

It is quite obvious that the Federal Court in *Adorna Properties Sdn Bhd* was concerned with forgery. That was the central issue in dispute between the parties involved. In this regard, the Federal Court adopted the approach taken by the Court of Appeal in the same case as to the requisite standard of proof in establishing forgery. Therein, the Court of Appeal said as follows:

> Now, it is a general rule of the common law that, in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities. The general rule finds expression in the judgment of the High Court of Australia (Barwick CJ, Kitto, Taylor, Menzies JJ in *Rejfek v. McElroy* [1965] 112 CLR 517, a case of fraudulent misrepresentation).
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> The common law of Malaysia has provided an exception to this rule in one case alone. Where fraud is alleged in civil proceedings, it must be proved beyond a reasonable doubt. The exception rests upon the following observation of Lord Atkin in *Narayanan Chettyar v. Official Assignee, Rangoon* AIR 1941 PC at p. 95:

> There are other difficulties in the plaintiffs' way which have been sufficiently considered in the judgments of the High Court. *Fraud of this nature, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt.* The High Court were justified in holding that the trial judge's finding was largely based on suspicion and conjecture. (emphasis added.)
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> This passage was applied by Rose CJ in the Singapore High Court in *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v. Koh Kim Guan* [1959] MLJ 173 which in turn was applied by the former Federal Court in *Tan Chye Chew & Anor v. Eastern Mining & Metals Co. Ltd* [1965] 1 MLJ 201. It has also been applied by our courts in later cases. See for example, *Tai Lee Finance Co. Sdn. Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81, per Abdul Hamid FCJ (as he then was) at p. 84.
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> The Privy Council has recognized the departure made by our common law upon the question of proof of fraud in civil proceedings. In *Saminathan v. Pappa* [1981] 1 MLJ 121 at p 126, Lord Diplock when delivering the advice of the Board said that.
>
> The onus of proof of fraud in Malaysia is proof beyond reasonable doubt.

The Court of Appeal went on to state that the *Atkin Test* established in *Narayanan Chettyar (supra)* was not followed by the High Court of Australia in *Rejfek v. McElroy (supra)*. It then made the observation that proof of forgery in civil proceedings, unlike fraud, came within the general rule i.e. that it need only be established on a balance of probabilities. This observation, as we have said earlier, was accepted by the Federal Court in *Adorna Properties Sdn Bhd.* Clearly, fraud was not the issue before the Federal Court in that case. Where fraud has been raised, we agree with the Court of Appeal in Adorna Properties Sdn Bhd, that the Malaysian courts have consistently applied the *Atkin Test.*

In *Saminathan v. Pappa (supra)*, a major issue in dispute was whether there was fraud or misrepresentation involved in the transfer of certain land to the respondent. Therein, the Federal Court held that as the respondent was the registered proprietor of the land, her title was indefeasible and the burden was on the appellant to prove fraud or misrepresentation. The Federal Court held that the appellant had failed to prove the allegation beyond reasonable doubt. The respondent's appeal was therefore allowed. Against that decision, the appellant appealed to the Privy Council. On the issue of fraud, Lord Diplock who delivered the judgment on behalf of the Board (comprising Lord Hailsham, Lord Diplock, Lord Edmund-Davies, Lord Russell and Lord Roskill) said *inter alia*:

> Their Lordships accordingly now turn to the three findings of fraud on which the learned judge relied as defeating the registered title of Miss Pappa under s 340(2)(a). Only one allegation of fraud was made in *Saminathan*'s pleading *viz.* that Miss Pappa had misrepresented to the Collector of Land Revenue that Saminathan desired the transfer of the title of the disputed land to her. There is a sentence in the trial judge's judgment which suggests that he found this allegation proved but counsel for Saminathan has been unable to point to even a shred of evidence that any such representation, whether true or false, was ever made to the Collector. **The onus of proof of fraud in Malayisa is beyond reasonable doubt.** In the circumstances, the Federal Court were clearly entitled, if not bound, to reject, as they did, the judge's finding on the matter. (emphasis added)

Clearly therefore, the Privy Council has found it fit to follow the *Atkin Test* concerning the standard of proof for fraud in civil proceedings in Malaysia.

In the circumstances, the Court of Appeal in the instant case is misconceived in holding that the proper test to establish fraud is on the balance of probabilities. In our view, the Court of Appeal has obviously misdirected itself in rejecting the proposition of law applied in *Saminathan v. Pappa (supra)* that the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt which has been consistently applied by the courts in Malaysia. We see no reason to disturb that trend. That being the position, the answer to the first question postulated has to be in the negative.

Now, at the hearing of the appeal, the respondents applied successfully to tender fresh evidence in the form of two documents: (1) a letter dated 6 February 2002 from the Assistant District Officer in Selama confirming that the original titles to the said lands had been removed from the land register and had been lost; that the transfer of the said lands to the appellant was registered only on 7 March 1975 and that Form 14A relating to the transfer has been removed and was lost; (2) a letter dated 11 February 2002 from the Director of Survey & Mapping, Perak, stating that the department could not trace the original file on the first survey done on the said lands in 1915 and that an extract of the Confirmed Plan of the said lands dated 19 November 1995 was attached to the letter which disclosed that the appellant had declared the original titles as lost for the purpose of the issuance of the titles in continuation. The reception of fresh evidence was made under r.7(3A) of the Rules of the Court of Appeal 1994. The Court of Appeal considered the application to adduce further evidence in the light of the established facts before the High Court. The court also considered the effect or effects of such further evidence as reflected in the following passage of its judgment:

With regard to further evidence as stated in para 3(1)(a)(i) above, this is merely a confirmation of PW1's evidence already adduced at the trial. And the further evidence as stated in para 3(1)(b) above is just a confirmation of what the defendant ('DW1') deposed at the trial. Having regard to the uncertainties in the evidence aforesaid and the aforesaid reasons for the uncertainties we are also satisfied that reasonable diligence would not have made this new evidence available to the Plaintiffs at the hearing before the High Court. Next, we have to consider whether the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the learned judge. As stated earlier, the Defendant claimed that he bought the Lands from the deceased in June 1969 and that he was the legal owner of the Lands since then; and PW1, who checked all the entries in the Presentation Book for the whole year of 1969 found no record of such dealing in respect of the lands. However, from the new evidence as stated in para 3(1)(a)(ii) and (iii), it is manifestly evident that the alleged transfer of the Lands to the Defendant was registered only on 7.3.1975 @ 10.15 a.m. nearly some six years later. To our mind, the extract of the relevant Presentation, being a public document which was produced from proper custody, bears the stamp of truth, that is to say, the alleged transfer was registered on 7.3.1975. Therefore, the claim by the Defendant as deposed in evidence that he bought the Lands in 1969 and that he became the legal owner of the Lands since then could not have been true. Even on the assumption that Form 14A was executed for the purpose of the transfer in June 1969, as the Defendant claimed, he could not have been the legal owner but only the beneficial owner of the Lands since 1969 because the non-registration of the transfer under the NLC does not confer on him the legal ownership to the Lands. However, by reason of (i) the fact that the relevant Form 14A had been removed from the Register of Documents in 1975 and hence, its loss from the possession of the Land Office, (ii) the non-existence of any sale and purchase agreement in respect of the purchase of the Lands by the defendant and (iii) the absence of any receipt for the payment of the consideration, we are inclined to belief (sic) that the transfer of the Lands to the Defendant could not have been transacted in June 1969, as claimed by the Defendant but sometime later, on or about 7.3.1975. We are fortified in our belief by the fact gathered from Presentation No. 71/75 (re-extract mentioned in para 3(1)(a)(ii) above) that only the registration fee of RM20 was charged for the two titles but not the penalty for late registration as compared to Presentation No. 75/75 in the same extract where it is shown that the registration fee of RM10 was charged for one title, and a further RM10 was charged for "Bayaran Lambat'. That being the case, the deceased could not have been a party to the execution of Form 14A, as the vendor, because he had died about six years earlier. On the issuance of the title in continuation, the Defendant deposed that after the payment of the purchase price he waited about three years in order to get the titles to the Lands but PW3 did not hand over the land titles to him and thereafter, he made a statutory declaration and applied for new land titles from the Land Office. However, as revealed by the extract or the Gazette Notifications as mentioned in para 3(1)(b) above, the Defendant declared that

the issued original titles to the Lands had been lost. This could not be true because he ought to have been aware that the land titles must have been kept by PW3 otherwise he would not have waited for three years for PW3 to hand them over to him. Further, there is no evidence that he had verified with PW3 that the land titles were lost before he made such declaration. Therefore, for the aforesaid reasons we are satisfied that the new evidence, had it been available at the trial, would have had a determining influence upon the decision of the learned Judge.

In the High Court, the respondents' action was dismissed because they were unable to prove fraud beyond reasonable doubt, relying on the case of *Saminathan v. Pappa (supra).* On appeal, the respondents successfully applied to tender fresh evidence. The Court of Appeal held that had such fresh evidence been available in the High Court, it would have had a determining influence upon its decision. Thus, when the evidence disclosed at the High Court is considered in the light of the fresh evidence aforesaid, there is, in our view, sufficient justification for the Court of Appeal to come to the findings and/or inferences adverted to in the passage cited above. Here, the Court of Appeal held that fraud was proved on the balance of probabilities. The standard of proof applied by the Court of Appeal, as we have indicated earlier, is misconceived. Notwithstanding the misconception, it seems evident that had the Court of Appeal adopted the correct standard i.e. proof beyond reasonable doubt, it would have nonetheless found fraud against the appellant. In the circumstances, when the leave question is examined in that context, we find it appropriate to dismiss this appeal with costs. Deposit to the respondents to account of taxed costs.

We also grant the following consequential orders:

(1) That vacant possession of the said lands be made forthwith;

(2) That the Titles to the said lands be released to the respondent's solicitors within 30 days from date hereof;

(3) That the Registrar of Titles is to effect the memorials for the name change to that of the respondent;

(4) That the accounts and inquiry from 10 March 1975 until to-date to be assessed by the Registrar; and

(5) That damages from 10 March 75 until today to be assessed by the Registrar, High Court.